to satisfy the debt in the second account must fail.

Before we conclude this judgment, we wish to advert to paragraphs 5 and 6 of the respondent's statement of defence in which it averred that on January 17, 1973 it filed a suit in Ipoh High Court (Civil Suit No. 10 of 1973) for the recovery of the sum due in the second account and that it had obtained an order of attachment before judgment in respect of the charged land. Evidence to support this defence was led by DW1 who said:

"Action was commenced to recover the amount due on the second account. The Bank obtained prohibitory order on the two titles under the charges."

At the conclusion of the trial on November 11, 1974 the learned trial Judge reserved judgment pending decision of that suit. But when he finally gave judgment six years later (on March 19, 1980) he made no reference to that Civil Suit nor to the order of attachment. Neither did the counsel for both sides make any submission either before the court below or before us touching these two matters. In the circumstances, we must assume that the Ipoh Civil Suit No. 10/1973 and the order of attachment before judgment given pursuant to the institution of that suit had no bearing upon the present case.

In conclusion, as there was no fraud as respects the sale agreement made on January 10, 1973 by which the appellants bought the charged land from Koh and as the respondent had no general lien to hold the charges for the sum due in the second account, the appellants must succeed in this appeal and are entitled to the prayers asked for in paragraph 6 of their Statement of Claim.

The appeal is therefore allowed with costs and the deposit is to be refunded to the appellants.

Appeal allowed.

Solicitors: *Karpal Singh & Co.; Cheang Lee & Ong.*

YAMAHA MOTOR CO. LTD. v. YAMAHA MALAYSIA SDN. BHD. & ORS.

[F.C. (Wan Suleiman, Abdul Hamid & Mohamed Azmi F.JJ.) October 20; December 13, 1982]

[Kuala Lumpur – Federal Court Civil Appeal No. 80 of 1981]

Practice & Procedure – Application to amend statement of claim after close of pleadings – Application dismissed – Discretion of trial judge not exercised judicially – Rules of High Court, 1980, Order 20.

In this case the appellants as judgment creditors of the first respondents had sued the four respondents for an order that the debenture issued by the first respondent in favour of the second respondent be declared null and void. After the pleadings were closed the appellants applied for leave to amend the amended statement of claim. The application was dismissed by the learned Judge and the appellants appealed to the Federal Court. The amendments sought would have the effect (a) that the appellants would be suing not only in their capacity as judgment creditors but also as majority share holders of the first respondent company and (b) that fraud or unlawful conspiracy would be pleaded expressly in the creation of the 1977 debenture instead of mere lack of consideration and security for a non-existent debt.

Held: (1) the general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result (a) whether the application was *bona fide* (b) whether the prejudice caused to the other side can be compensated by costs and (c) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character;

(2) in this case the appellants did not by their amendment seek to change their capacity to sue as envisaged under Order 20 rules 5(4) Rules of the High Court. All they want is to invoke their own right as shareholders of the first respondent company in addition to their right as judgment creditors of the said company, which had gone into liquidation;

(3) on the facts of the present case, even if the allegation of fraud can be held to constitute a new cause of action, the amendment is allowable under Order 20 rule 5(5) as it arises out of the same facts or substantially the same facts as the original cause of action in which the relief had already been claimed by the appellants in the original pleading. The court should in the exercise of its discretion allow the amendment even if it had the effect of introducing a plea of fraud for the first time on the ground that the amendment would not only be in the interest of justice but also for the purpose of determining the real questions in controversy between the parties;

(4) the learned judge had not exercised his discretion judicially and the appeal should be allowed and the appellants given leave to amend their amended statement of claim.

Cases referred to:

(1) *Kam Hoy Trading* v. *Kam Fatt Tin Mine* [1963] M.L.J. 248.
(2) *Lawrance* v. *Lord Norreys* (1888) 39 Ch. D. 213.
(3) *Bentley & Co. Ltd.* v. *Black* 9 T.L.R. 580.

FEDERAL COURT.

Mohamed Ismail bin Shariff for the appellants.

Joseph Loo for the 1st respondent.

Lim Chor Pee (*Yap Soon Nam* with him) for the 2nd respondent.

C.F. Leow for the 3rd & 4th respondents.

Cur. Adv. Vult.

Mohamed Azmi F.J. (delivering the Judgment of the Court): This is an appeal from the dismissal of an application under Order 20 Rule 5, Rules of the High Court 1980, for leave to amend the Amended Statement of Claim after pleadings had closed but before the commencement of actual trial.

By the Amended Statement of Claim dated May 22, 1980, the appellants as judgment creditors of the first respondent, sued the four respondents for an order that a debenture issued on November 24, 1977 by the first respondent in favour of the second respondent, be declared null and void. Although the debenture was purportedly issued to secure a principal sum of S$6,000,000.00 which was alleged to be due from the first respondent to the second respondent, it is pleaded that no such debt was in fact owing to the second respondent, and even if there were such a debt, everything had been settled prior to the date of issue of the said debenture, and as such the 1977 debenture was null and void for lack of consideration. The appellants also challenged the validity of a charge created by the first respondent in November 1977 in favour of the second respondent, over a piece of land at Batu Tiga, Selangor, pursuant to the said debenture to secure repayment of the alleged loan. The third and fourth respondents were brought into the picture merely in their capacity as Receivers and Managers of the first respondent appointed under the impugned debenture. The appellants therefore prayed for an order that their appointments be declared null and void as well, and they also sought for other consequential reliefs. By July 1980, the four respondents had filed their Statement of Defence, and the crux of their Defence was that the appellants had no reasonable cause of action against them on the grounds that the appellants were not a party either to the debenture or the charge. They also denied that the debenture was created without consideration. They maintained that a debt in the principal sum of not exceeding S$6,000,000.00 was owing to the second respondent by the first respondent as recited in the debenture. By Summons in Chambers dated February 20, 1981, the appellants applied for leave to amend the Amended Statement of Claim. When the application came up for hearing in chambers on March 10, 1981, it was dismissed with costs. On that same day the learned Judge allowed an application by the respondents for a point of law to be tried to determine whether as judgment creditors of the first respondent, the appellants had any right in respect of the debenture. The learned Judge also issued a certificate under Order 56 Rule 2(2) Rules of the High Court, certifying that he required no further argument in respect of the appellants' application.

Looking at the proposed amendment to the Amended Statement of Claim, it would if allowed have three significant effects. First, the appellants would be suing not only in their capacity as judgment creditors but also as majority shareholders of the first Respondent Company (paras. 2, 3 and 5). Secondly, fraud (or unlawful conspiracy as the appellants would prefer to call it) would be pleaded expressly in the creation of the 1977 debenture instead of mere lack of consideration and security for non-existent debt (paras. 21 to 34). Thirdly, by para 35 of the proposed amendment, section 11 of the Exchange Control Act 1953 would be pleaded to render both the debenture and the charge null and void. But before us only the first and second effects are being canvassed seriously.

Under Order 20 of the Rules of the High Court 1980, which is equivalent to Order 28 Rules of Supreme Court, a Judge has a discretion to allow leave to amend pleadings. Like any other discretion, it must of course be exercised judicially (see *Kam Hoy Trading* v. *Kam Fatt Tin Mine*)[1]. The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result, (1) whether the application is *bona fide;* (2) whether the prejudice caused to the other side can be compensated by costs and (3) whether the amendments would not in effect turn the

suit from one character into a suit of another and inconsistent character. (See *Mallal's* Supreme Court Practice page 342). If the answers are in the affirmative, an application for amendment should be allowed at any stage of the proceedings particularly before trial, even if the effect of the amendment would be to add or substitute a new cause of action, provided the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the original statement of claim. In this appeal it is unfortunate that the learned Judge had failed to set out anywhere in the appeal records the factor or factors which he had taken into consideration in the exercise of his discretion to dismiss the appellants' application. We must therefore review the application afresh.

On the first group of amendments regarding appellants' capacity as majority shareholders of the first respondent company, we note that the appellants do not by the amendment seek to change their capacity to sue as envisaged under Order 20 Rule 5(4) Rules of the High Court. All they want to do is to invoke their own right as shareholders of the first respondent company in addition to their right as judgment creditors to the said company, which has now gone into liquidation. Mr. C.F. Leow, counsel for third and fourth respondents, argues that if the appellants failed as judgment creditors they would also fail as shareholders. That, we think is prejudging the issue. At this stage of the proceedings the court is not concerned with the merit of the appellants' case. Even after amendment, the respondents have the right to take necessary steps to strike out the whole claim if the Statement of Claim, as amended, does not disclose any cause of action or is found to be frivolous and vexatious and an abuse of process of the court.

The second respondent's objection to the amendment is twofold. First, they say the proposed amendment does not disclose a reasonable cause of action, even if it could be allowed. Secondly, as a legal proposition based on the authority of *Lawrance* v. *Lord Norreys*[2] and *Bentley and Co. (Ltd.)* v. *Black*[3], the court will not allow an amendment for the purpose of adding a plea of fraud, where fraud has not been pleaded in the first instance, except in the most exceptional circumstances. The answer to the first objection is that the amendment does not in reality introduce any new cause of action. The amendment merely shows more clearly why the debenture is null and void. Mr. Lim Chor Pee, counsel for the second respondent, whose submission is adopted by counsel for the first respondent, has meticulously shown to us from the facts of the case why the appellants' claim would fail with or without the amendment. That may or may not be so, but in the final analysis it is for the trial court eventually to decide the merit of appellants' claim after hearing all the evidence and arguments. As to the second objection, Order 20 Rule 5(5) provides:

> "An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment."

In alleging 'fraud' or 'conspiracy' in the proposed amendment, we are of the view that having regard to the original Amended Statement of Claim, the appellants have not in effect, turned the original claim which is for an order to declare the 1977 debenture null and void for lack of consideration, into a claim of another and inconsistent character. From the very beginning, the appellants' claim is that there was in fact no debt at all due from the first respondent to the second respondent giving rise to any legal right to create the 1977 debenture and charge. By the proposed amendment, the appellants merely allege that as there was no money due between the two parties, the debenture was created as a result of conspiracy or fraud by the first and second respondents and others. The alleged conspiracy or fraud is, to our mind, a mere extension of the allegation that the debenture is null and void for lack of consideration. Indeed on the facts of the present case, even if the allegation of fraud can be held to constitute a new cause of action, the amendment is allowable under Order 20 Rule 5(5) as it arises out of the same facts or substantially the same facts as the original cause of action in which the relief has already been claimed by the appellants in the original pleading. Thus, as to the second objection, in view of the nature of the original suit, the court should in the exercise of its discretion allow the amendment even if it had the effect of introducing a plea of fraud for the first time, on the ground that the amendment would not only be in the interest of justice but also for the purpose of determining the real questions in controversy between the parties. In our view,

Lawrance v. *Lord Norreys* (*ante*) and *Bentley & Co. (Ltd.)* v. *Black* (*ante*) are no authorities for dismissing the present appeal. Not only are the facts in those two cases different, but no judicial pronouncement was made to exclude fraud altogether from any amendment if it is pleaded for the first time before the same court before judgment. Indeed in *Lawrance Case*, in commenting that the proposed amendment on the plea of fraud was intended to defeat the operation of the Statute of Limitation, Bowen L.J. went on to state at page 235 that, "No court ought to refuse leave to make such amendments if it saw any reasonable prospect, or, I may say, reasonable probability, that a case could be made of fraud which would defeat the statute – that there was any substance in the case, that it was not simply fiction and imagination." In requiring an affidavit to explain why fraud had not been pleaded in the first instance and how the plaintiff came to think that there was ground for putting it forward, the requirement should be read in the light of the facts that before the amendment was applied in the Chancery Division, a similar application had already been dismissed in the Queens Bench Division which had refused leave to amend and struck out the Statement of Claim and dismissed the plaintiffs' action on ground that no cause of action was shown. Similarly, in *Bentley & Co. (Ltd.)* v. *Black* (*ante*) after judgment was given for the plaintiffs, the defendants applied for a new trial in the Court of Appeal. One of the objections raised by the plaintiff was that fraud had not been pleaded in the first instance i.e. in the original trial and neither had any amendment been made for the purpose of setting up a plea of fraud. It was in this context that Lord Esher M.R. said, "It had for a long time been the universal practice, except in the most exceptional circumstances, not to allow an amendment for the purpose of adding a plea of fraud where fraud had not been pleaded in the first instance." In the appeal before us, the amendment to include a plea of fraud was not made during a retrial or before another court after judgment had been given. On the materials before us and at this early stage of the proceedings it would be wrong for us to conclude that the alleged fraud has no substance whatsoever and that it is simply the appellants' fiction and imagination. The appellants' summons in chambers was supported by affidavit sworn on February 20, 1981 by Mr. Varghese George. The contents of this affidavit had not been materially challenged by the only affidavit in reply sworn by Mr. Soo Hock Ho, a director of the first respondent. From the contents of Mr. Soo's affidavit, it was not disputed that the appellants were a party to a series of litigation with parties related to the first and second respondents. One of these was Kuala Lumpur High Court Civil Suit No. 2173 of 1978, the trial of which had been completed. Since the conclusion of the said trial and as a result of further search, new facts and matters had emerged which the appellants had been advised to include in their pleadings which were relevant and necessary for the fair trial of the present action. There is nothing in the appeal record and the argument before us to suggest that the appellants' application was made *mala fide*, or that whatever prejudice that might be caused to the respondents cannot be compensated by costs. Nor have the respondents been able to show that by such amendment, the original suit would be turned into a suit of different and inconsistent character. Further, by their Defence, the respondents have admitted that the appellants had obtained judgment against the first respondent on September 12, 1979, for the sum of US$7,589,271.05cts. vide Kuala Lumpur High Court Civil Suit No. 2963 of 1978. Since the first respondent has now gone into liquidation, it is apparent that as unsecured creditors of the first respondent, the appellants would have slim chance of enjoying the fruits of their judgment, unless they are allowed full opportunity to prove their claim that the 1977 debenture was null and void and of no effect. As shareholders they might also have an interest in the debenture if indeed it was fraudulently issued.

In our view, the learned Judge had not exercised his discretion judicially. We would therefore allow this appeal with costs. The order of the learned Judge dated March 10, 1981 is set aside. The appellants are granted leave to amend their Amended Statement of Claim in terms of the summons in chambers dated February 20, 1981.

Appeal allowed.

Solicitors: *Zain & Co.; Ariffin & Ooi.; Chor Pee & Co.; Leow & Co.*